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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 222

FISHER STUDIO, INC., ROBERT V. FISHER, and DAVID ISACSON,

*Petitioners,*

*—against—*

LOEW'S INCORPORATED, ET AL.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS

BRUCE BROMLEY,
15 Broad Street,
New York 5, N. Y.,

LOUIS PHILLIPS,
1501 Broadway,
New York 36, N. Y.,

*Attorneys for Respondents.*

JOHN LOGAN O'DONNELL,
LEO P. ARNABOLDI, JR.,
*Of Counsel.*

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## BRIEF FOR RESPONDENTS

Respondents pray that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied. That judgment unanimously affirmed an order of the United States District Court for the Eastern District of New York that David H. Isaacson and Malkan & Isaacson were disqualified to act as attorneys for the plaintiffs in this action (3a-4a)* and an order of said District Court denying a motion for a new trial (19a-22a).

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*References are as follows:

"a" following a page number—to petitioners' printed appendix in the Court of Appeals;

"b" following a page number—to respondents' printed appendix in the Court of Appeals;

"Rep."—to the Special Master's Report.

## Canons Involved

Canon 6 of the Canons of Professional Ethics of the American Bar Association* reads in pertinent part as follows:

> "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Canon 37 reads in pertinent part as follows:

> "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client."

## Statement

The most misleading characteristic of the four page Statement of the Case appearing in the Petition for Certiorari is the suggestion that Isaacson was disqualified unconstitutionally on the basis of "secret" evidence. The Petition asserts repeatedly that Isaacson was disqualified

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*Pursuant to Rule 5(c) of the United States District Court for the Eastern District of New York, the Canons of Professional Ethics of the American Bar Association were adopted as rules of court.

on the basis of Sargoy & Stein's files pertaining to 16 mm. films. For instance, petitioners allege on page 14 that the Master declared that he would rely on the files "utterly". The record citation (105a) given for this assertion shows that the Master neither said nor implied any such thing. Moreover, the Master never referred in his Report of over 220 pages to what information, if any, he learned from the sampling of the 16 mm. files nor did he purport to rely on any such information. The Master examined the 16 mm. files only to determine if they contained privileged information, a procedure he also followed when defendants called for the production of Isacson's office files (136b-138b). Accordingly, the assumption that the disqualification was based on the 16 mm. files is wholly gratuitous and, indeed, outlandish in view of the plethora of evidence introduced by respondents.

Isacson was disqualified after he and his attorney had participated in extensive hearings before a Master from time to time between December 2, 1952 and May 21, 1953 and in the course of which "over 3,500 pages of testimony were taken and some 185 exhibits, embracing many additional thousands of pages, were introduced in evidence" (Rep. 7). It is this evidence to which the Court of Appeals had reference in its opinion when it said "The facts upon which the disqualification was based were exhaustively developed in the proceedings before the Special Master and are set forth in convincing detail in his thorough report" (Pet. for Cert. 22).

Petitioners have also included a chart on page 12 of their Petition purporting to quote a portion of the Master's Report to create the misleading impression that the Master was relying upon the 16 mm. files he inspected or upon the assertions of counsel also included in the chart. Actually the Master was summarizing Mr. Sargoy's testimony and cited the pages thereof which petitioners omitted from their quotation (Rep. 25). Furthermore, the chart is of

no evidentiary value because it is based upon the erroneous assumption that the 35 mm. files which were voluminous (666 pounds of these files were introduced in evidence—Rep. 113) contained no information on 16 mm. matters and that therefore the Master must have been referring to the 16 mm. files, only a few of which were produced for his inspection.

Isacson was associated with Sargoy & Stein from November, 1946, until March, 1951, when, according to Mr. Sargoy's testimony, Isacson was discharged because the firm had lost confidence in him (Rep. 65). Sargoy & Stein and its predecessors have for many years acted as special counsel for numerous motion picture companies, including many of the respondents herein (Rep. 10-11).

The Court of Appeals pointed out that during Isacson's employment Sargoy & Stein "brought or participated in 464 suits on behalf of distributors against exhibitors for percentage frauds or underreporting or other actions for recovery of rentals. Of these, at least 233 involved antitrust defenses, counterclaims, or countersuits by exhibitors. Of these 233 cases, Isacson, then on behalf of distributors, initialed or marked memoranda or correspondence in every one, wrote letters or memoranda in 170 of the cases, and participated in taking depositions in 72" (Pet. for Cert. 23). The Court of Appeals pointed out further that "There was convincing evidence that Isacson worked on and was well acquainted with the antitrust aspects of a number of cases and his evasive testimony at the Master's hearing did not serve to rebut this conclusion. Although his work primarily involved 35 mm. matters, he had access to the 16mm. files and 16 mm. matters were on occasion discussed with him. In any event, 35 mm. and 16 mm. antitrust problems are so related that confidential information gained in one area would be of value in the other" (Pet. for Cert. 23).

No less an authority than Isacson himself has likewise indicated his belief that 16 mm. and 35 mm. matters are

intertwined in an affidavit filed by him in the *Kunz* case, a 16 mm. antitrust action pending in Philadelphia, in which Malkan & Iscason were counsel for plaintiff. There Isacson stated:

> "1. Contrary to the assumption of defendants' affidavits, defendants' 35 mm. activities constitute part of the plaintiff's cause of action in at least three ways:
>
> "(a) The conspiracy complained of is a continuing one to restrict distribution of feature films from their initial release in 35 mm. form to the final 16 mm. release: (Complaint, paras. 27, 32 and 35);
>
> "(b) The defendants combined and conspired to prevent or delay the release of many feature films in 16 mm. form for the purpose of unlawfully protecting defendants' business of distributing and exhibiting 35 mm. films. (Id., paras. 28, 35);
>
> "(c) Defendants combined and conspired among themselves and with unaffiliated theatre owners to restrict the activities of 16 mm. dealers including the plaintiffs so as to prevent competition with 35 mm. theatres. (Id., paras. 28, 29, 30, 31)." (Rep. 180-182).

The Master found that Isacson solicited the present and other actions by holding out as "bait" his former association with Sargoy & Stein and his special knowledge of confidential data concerning the motion picture companies (Rep. 185). In the words of the Court of Appeals "the evidence of solicitation is clear cut and convincing, and in many cases is interwoven with the evidence of improper use of confidential information. For example, the Special Master found that Isacson sent a letter to one Coy, a potential client who was then engaged in litigation against certain motion picture companies represented by Sargoy &

Stein, stating 'that Mr. Isacson here was formerly with Sargoy & Stein and is familiar with the procedures and tactics and settlements'. The record is replete with other evidence of solicitation and advertisement. As pithily put by the Special Master, 'All that was missing from Mr. Isacson's campaign was a neon sign.' " (Pet. for Cert. 25).

The Master's reference to the neon sign was occasioned in part by the fact that Isacson sent "to persons who were at that very time engaged in litigation with his [Isacson's] former client" (Rep. 185) cards announcing the formation of the firm of Malkan & Isacson and doctored photographs of an article appearing in a trade paper which stated originally that "David H. Isacson, formerly with the law firm of Sargoy & Stein, became associated with Arnold Malkin, prominent New York attorney" (Ex. XX, 271b; Rep. 87). The photograph was doctored so that the word "antitrust" was added before the word "attorney" and Malkan's name was spelled correctly (Rep. 87-88). The words "Independent Film Journal" were also added to the photograph underneath the article in the newspaper (EX. G, 270b; Rep. 88). Mr. Coy, who received the letter summarized by the Court of Appeals in the above-quoted excerpt, was also one of the exhibitors engaged in litigation with clients of Sargoy & Stein to whom Isacson sent an announcement card and a doctored photograph.

That Isacson's confidential information was of special value to the plaintiffs in this case was also clear to the Court of Appeals: "In fact the inference is overwhelming that Isacson's primary value to the plaintiffs here lies in his possession of this information. Isacson left Sargoy & Stein early in March, 1951, and did not enter into partnership with Malkan until July, 1952. During that time he unsuccessfully tried to obtain legal employment, operated a garage, and even made an effort to rejoin Sargoy & Stein. His lack of legal success during this interim period when

viewed in connection with the formation of the partnership and the subsequent institution of this lawsuit lend impressive weight to the conclusion that the confidential information was the principal reason for his retainer by Fisher" (Pet. for Cert. 24).

**Summary of Respondents' Position**

In their zeal to present this Court with a constitutional issue, petitioners have engaged in distortion of the proceedings below as is manifested by the erroneous premises upon which they base the questions presented on page 2 of their Petition. The first "question" they present is whether an attorney may be "disqualified on the basis of secret evidence; *i.e.*, files which were withheld from the attorney." The premise of this question is invalid because neither the Master nor the lower courts relied upon the files in question to disqualify Isaeson; the files were never introduced in evidence nor used by respondents in the case because there was overwhelming evidence in other areas to show that Isaeson had confidential information relevant to the case.

The petitioners' second question is whether constitutional objections can be deemed waived "by implication." This question is not supported by the record below because, as the Court of Appeals held, no constitutional issue was involved and petitioners *specifically* waived their evidentiary objection.

Their third question is whether an order of disqualification by a District Judge who "acted far from judicially" can stand. The answer to this question is that the District Judge involved had confirmed the Master's Report and held Isaeson disqualified many months prior to the hearing on a motion for a new trial at which this allegedly unjudicial conduct occurred (4a, 21a). As a matter of fact, the District Judge could have, and should have, denied

the motion for a new trial both as a matter of law and as a matter of discretion. While the Court of Appeals felt that the District Judge's conduct during the hearing on the motion for a new trial was unfortunate, it made plain that such conduct was not a sufficient basis for upsetting the decision, stating:

> "* * * It is quite doubtful that this 'newly discovered evidence' could have changed the result if a new trial had been granted * * * * In any event there was not an abuse of discretion in refusing to grant a new trial on the basis of the dubious evidence presented by appellants * * * appellants' fate was clear after the thorough trial before the Master; and however regrettable this incident, it should not lead to a reversal of a long and well-proven case with a salutary conclusion". (Pet. for Cert. 26-27).

This Court has heretofore denied certiorari in two cases involving the disqualification of Isacson's partner, Arnold G. Malkan, on the basis of the disqualification of Isacson and their firm in the instant case. *Laskey Bros. of W. Va.* v. *Warner Bros. Pictures, et al.* and *Austin Theatre, Inc.* v. *Warner Bros. Pictures, et al.*, 224 F. 2d 824 (1955), *cert. denied*, 350 U. S. 932 (1956). Since all of the pertinent issues in this case were raised in the petitions for certiorari in those cases, the writ should be denied here.

## Reasons for Denying the Writ

### 1. No Substantial Constitutional Question is Raised in the Petition.

Petitioners claim that they were denied due process of law because they contend that Isacson was disqualified on the basis of Sargoy & Stein's 16 mm. files which the Master did not compel the respondents to show to the petitioners.

In their brief in the Court of Appeals, petitioners argued that the respondents employed these files affirmatively to fill a gap in their proof. Having lost on that issue below, petitioners now contend that it makes no difference whether or not the files were necessary to fill a gap in the affirmative proof and apparently that they have an absolute right to see any document inspected by the Master regardless of the circumstances (Pet. for Cert. 15).

Petitioners' argument raises no substantial constitutional question, particularly in view of the background surrounding the examination of the 16 mm. files by the Master. The 16 mm. files were inspected by the Master only because Isacson's counsel demanded their production during his cross-examination of Edward Sargoy. Although respondents objected to producing these files since they did not wish to use the files to disqualify Isacson, they produced a sampling from the 16 mm. files for inspection by the Master. Respondents argued that the files were privileged and contained information relevant to the instant action; the Master ruled that the petitioners were not entitled to examine the 16 mm. files and the files were not introduced in evidence. The Court of Appeals found that the Master had exercised a "wise discretion in his ruling" since "on the equities there is little to be said for such a violation of privacy as would be involved in thus opening these private files to a public and rival gaze" (Pet. for Cert. 26).

The Master's Report makes it clear, and petitioners offer no record citations to the contrary, that the Master did not rely upon anything he may have read in the 16 mm. files for the Isacson disqualification. The Master relied upon the overwhelming evidence of Isacson's intimate familiarity with the distribution methods and antitrust problems of the respondents, upon the inter-relationship between 35 mm. matters with which Isacson was unquestionably familiar and 16 mm. matters, and upon the familiarity with

16 mm. matters which Isaacson gained through staff meetings and conversations with other attorneys at Sargoy & Stein (Rep. 30, 166-183).

Petitioners' due process argument is based upon the assumption that the 16 mm. files were vital to the decision. As the Court of Appeals found, however, Isaacson was completely familiar with antitrust problems in the 35 mm. field, and 35 mm. and 16 mm. antitrust problems are so related that confidential information gained in one area would be of value in another. See also Rep. 180-182. Since there was overwhelming proof that Isaacson had acquired confidential information separate and apart from that contained in the 16 mm. files and since it was proven that he had access to the 16 mm. files and that 16 mm. matters were on occasion discussed with him, the contents of the 16 mm. files could not have provided petitioners with the "affirmative exoneration" which was "vital for their salvation" (Pet. for Cert. 26).

A number of recent cases have established the principle that in order to disqualify an attorney it is only necessary to show a "substantial relationship" between the matters handled by the attorney for a client and the subject matter of an action brought by such attorney against the former client. In view of this principle, the respondents were not required to prove the content of the confidential information acquired by Isaacson and the 16 mm. files were unnecessary to establish Isaacson's disqualification.

In rejecting the contention that a former client in a disqualification proceeding is required to prove what confidential matters were disclosed to his former attorney, District Judge Weinfeld wrote in *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S. D. N. Y. 1953):

> "* * * the former client need show no more than that the matters embraced within the pending suit

> wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation."

In *Consolidated Theatres, Inc.* v. *Warner Bros. Circuit Management Corp.*, 216 F. 2d 920, 924 (2d Cir. 1954), the Court of Appeals expressly subscribed to Judge Weinfeld's view, and stated in addition:

> "* * * there is no suggestion in the Canons that to invoke an obligation defined therein the proof thereof must be by *direct* evidence. We think that the professional obligation therein defined, like any legal relationship, may be established by reasonable inference."

In *United States* v. *Standard Oil Company*, 136 F. Supp. 345, 355 (S. D. N. Y. 1955), District Judge Kaufman summarized the rationale of the foregoing decisions thus:

> "The client must be secure in his belief that the lawyer will be forever barred from disclosing confidences reposed in him. It follows that if, in order to protect his secret utterances to counsel, the client or former client is required to reveal these utterances, the very purpose of the rule of secrecy will be destroyed, and the free flow of information from client to attorney, so vital to our system of justice, will be irreparably damaged. Therefore, to guarantee that these confidences remain inviolate, the courts will assume that when a client entrusts an attorney with the handling of a particular matter, the client will reveal to that counsel all the information at his disposal, including confidential matter. It is upon this assumption that the courts will bar

> an attorney from taking a position adverse to a former client in regard to any matters substantially related to those in which the attorney represented that client."

Regardless of what the 16 mm. files contained or did not contain, there was evidence in the record which was more than sufficient to prove that Isaeson had obtained confidential information relevant to the present action. All of the cases on the withholding of possible evidence cited by petitioners in support of their due process argument are distinguishable. In each of those cases the evidence in question was relevant to the very gist of the controversy and could have determined the outcome of litigation. For example, in *Coplon** the evidence concerning wiretapping might have rendered improper the evidence which convicted Judith Coplon, and in that event reversal of her conviction would have been necessary. In the *Andolschek*** case the Court refused to allow the suppression of documents in a criminal prosecution "founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate" (142 F. 2d 503, 506). *Ohio Bell Telephone Co.* v. *Public Utilities Comm.**** was a rate case in which the Public Utilities Commission declined to make known the data upon which it based a determination that rates previously collected were excessive.

In their effort to provide a constitutional argument in support of the writ, petitioners have cited cases which are either totally irrelevant to or clearly distinguishable from the issues involved. Despite the extensive hearing afforded them, they cite *Philadelphia Co.* v. *Securities and Exchange*

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**United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950), *cert. denied*, 342 U. S. 920 (1952).

***United States* v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944).

****301 U. S. 292 (1937).

*Commission*, 175 F. 2d 808 (D. C. Cir. 1948), vacated as moot, 337 U. S. 901 (1949), where the Court held that under the Public Utility Holding Company Act the Philadelphia Company had not received the full hearing to which it was entitled. Petitioners have never raised any question as to the fairness of the Master and yet they cite *Inland Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 9 (7th Cir. 1940), a case in which an order of the N. L. R. B. was reversed because the trial examiner was obviously biased against Inland Steel.

Petitioners argue that the District Court relied on the 16 mm. files to disqualify Isacson and the Court of Appeals merely followed the District Court (Pet. for Cert. p. 12). This misconstruction is exposed by the fact that the opinion of the District Court at no point refers to the 16 mm. files. It merely refers to Sargoy & Stein's files generally from which some 666 pounds of documents (excluding 16 mm. files) were produced (Rep. 113). The District Court's opinion, like the Master's Report, bases disqualification on the evidence in the record. For example, it states (13a):

> "The evidence indicated, and the Special Master found, that Mr. Isacson had complete access to all records and files in the office of Sargoy & Stein."

And again (15a):

> "One year after Isacson severed his employment with Sargoy & Stein this suit was commenced. Any knowledge obtained by Isacson in the motion picture field was a result of his employment with Sargoy & Stein. There is no doubt from the mass of evidence before the Special Master that Isacson obtained much of the information which laid the groundwork for Fisher's suit as a result of such employment. The Special Master so found, and I see no reason to disturb this finding."

And again (18a):

> "There is ample evidence for disqualification. The report of the Special Master as to that finding is hereby confirmed."

Confirmation of the fact that Judge Abruzzo's opinion is not premised on Sargoy & Stein's 16 mm. files may also be found in the transcript of argument on the motion for a new trial where Judge Abruzzo stated specifically to petitioners' counsel (315b):

> "Now, I think in the interest of argument you should tell me, first, '(a)' what your newly discovered evidence is, and you should rely upon the fact that I know exactly what the facts are which were testified to by the various witnesses, and that includes some 3600 pages of testimony."

In view of the overwhelming proof and findings below it is difficult to imagine that petitioners sincerely believe that disqualification was based on undisclosed files of Sargoy & Stein on 16 mm. matters. Surely the principles set forth in Rule 61 of the Federal Rules of Civil Procedure are applicable:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for * * * vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Petitioners' due process objection also misconceives the purpose and character of a disqualification proceeding. A motion to disqualify is designed to prevent an attorney for

one client from accepting subsequent retainer from another "in matters adversely affecting any interest of the client with respect to which confidence has been reposed" (Canon 6). Disqualification proceedings are not criminal or even disciplinary in nature; their function is to enforce a rule of secrecy upon attorneys and thereby encourage prospective clients to divulge fully and freely to their attorneys, all the facts bearing on litigation. *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 269 (S. D. N. Y. 1953).

The power to disqualify is an attribute of a court's special and inherent authority to preserve high standards in the practice of law before it. Such power has long been held to be exercisable summarily in disbarment or suspension proceedings. *Ex parte Wall*, 107 U. S. 265, 273 (1883). Proceedings to disbar or suspend an attorney, although they may be disciplinary in effect and may be initiated by private persons, are neither criminal in nature nor are they like the usual adversary civil suit. *Id.* 288; 7 C. J. S. Attorney and Client § 28. Courts have held that strict rules of evidence are not applicable in such proceedings, and that the right of confrontation which has been clearly enunciated by this Court in criminal cases does not exist in such proceedings. See *State* v. *Bomer*, 179 Tenn. 67, 78, 162 S. W. 2d 515, 520 (1942); *In re Wilson*, 76 Ariz. 49, 258 P. 2d 433 (1953) (holding a tape recording admissible although not the best evidence); *People* v. *Stonecipher*, 271 Ill. 506, 111 N. E. 496 (1916).

The motion below was not aimed at disbarring or suspending Isaacson, but only at preventing his utilization of special knowledge gained by him while in a position of trust. It is a far less drastic exercise of a court's power over the conduct of attorneys than disbarment or suspension. The informal and summary procedure permitted in disbarment proceedings should *a fortiori* apply on a disqualification

motion. Therefore, the full hearing which Isacson received below was more than that to which he was entitled.

The criminal cases cited by petitioners in support of the contention that due process has been denied them are not applicable to the present proceeding. *McNabb* v. *United States*, 318 U. S. 332 (1943), was a murder case in which this Court reversed the convictions because of coerced confessions. *Simmons* v. *United States*, 348 U. S. 397 (1955), and *Gonzales* v. *United States*, 348 U. S. 407 (1955), were both cases of statutory interpretation in which this Court determined, on the basis of the particular statute involved, the extent of the disclosure which the Department of Justice was required to make to supposed conscientious objectors on trial for violation of the draft law. The requirement of due process is not a rigid one; its extent and scope necessarily depend upon the nature of the particular proceeding involved—"the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case." *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 246 (1944).

In view of the rule that the greatest weight will be accorded to the concurrent findings of two courts below, and in view of the special nature of the disqualification proceeding, the judgment below should not be upset "in the absence of a very obvious and exceptional showing of error". *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275 (1949); *In re Claiborne*, 119 F. 2d. 647, 650-651 (1st Cir. 1941).

Petitioners can derive no support from the law review articles cited by them (Pet. for Cert. 16-18), since all of these articles support the basis of disqualification found against Isacson by the Master and the lower courts. Although petitioners point out that a commentator in 3 U. C. L. A. Law Rev. 105 (1955) noted that the decision in the *Laskey* case, *supra*, revealed "lack of precedent", they

failed to advise that in the same sentence that commentator concluded that the case "demands" the disqualification found therein. The note in 64 Yale L. J. 917, 928 (1955) concluded that the decision of the Court of Appeals in the *Consolidated* case, *supra*, was sound despite the fact that the decision in that case was more severe than the disqualification of Isacson herein in view of the fact that the attorney's connection with the distributors was more attenuated than Isacson's and his good faith was never questioned while the Master referred to Isacson's testimony as "unreliable", "incredible", "evasive" and "completely unworthy of belief" (see, e. g., Rep. 48, 117, 122-123, 128, 164-165, and 178).

**2. Any Possible Objection Concerning the Master's Refusal to Permit Them to Inspect the 16 mm. Files Has Been Waived by the Petitioners.**

On two occasions the petitioners waived the objection which they now press upon this Court. As the Court of Appeals found, the petitioners did not object to the Master's refusal to allow them to inspect the 16 mm. files at the time when he made his ruling (104a). In addition, on the very last day of the hearings, the Master proposed that the parties waive all evidentiary questions not specifically raised in the briefs which they were to submit to him, stating (267b):

> "In the interest of expediting a decision, however, and in order to avoid confusing the main issues in a maze of evidentiary questions, I suggest this procedure:
>
> "Either raise the evidentiary point as a genuine argument in your brief or waive it.
>
> "How do you gentlemen feel about that suggestion?"

The attorneys for both sides concurred in the Master's proposal, with counsel for petitioners stating (267b):

> "I was going to say, if the Master pleases, that I concur completely in what you say, and in so far as I am concerned, any objection that I do not raise in my brief by objection, and I mean evidentiary objection, I now state that I waive."

Respondents raised certain evidentiary objections in their brief before the Master and the Master ruled upon them in his Report; see, for example, the rulings at Report pages 159 and 180-181. Petitioners belatedly raised their present evidentiary objection, however, for the first time at the oral argument on May 21, 1954, on their motion for a new trial, more than nine months after the filing of the Master's Report and almost two months after Judge Abruzzo handed down his opinion confirming that Report. The fact that the objection was then being raised for the first time is evident from the following colloquy between the Court and the attorneys representing the petitioners (316b):

> "Mr. Kaufman: * * * Now, those 26 files were not and were never put into evidence, they were never offered in evidence. Mr. Sargoy was never cross-examined as to the contents of those files. Nobody knows what was in the files.
>
> "The Special Master resorted to a most peculiar and wholly improper procedure of examining those files outside of the presence of Mr. Nova, Mr. Isaeson's counsel, and apparently—
>
> "The Court: I wish you would stick to newly discovered evidence.
>
> "The point you are raising is a point made for the first time; it wasn't even raised in the brief before me."

**3. The Conduct of the District Judge on the Motion for New Trial Provides No Basis for Certiorari.**

Before the Court of Appeals petitioners argued that the failure of the District Court to grant petitioners' motion

for a new trial was reversible error. They now argue that because of an alleged unjudicial attitude at the hearing on the motion for a new trial the decision on disqualification which had been rendered months before should be reversed.

The granting of a new trial rests within the discretion of the trial court and the jurisdiction of an appellate court to review the denial of a new trial is severely limited. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 481 (1933). The Court of Appeals held that the "newly discovered evidence" offered by the petitioners was "dubious" and that it was doubtful whether it could have changed the result. Petitioners submitted two affidavits in connection with the motion for a new trial: the first affidavit by Isacson stated that he had just learned the whereabouts of Hilton who had been in charge of the Sargoy & Stein 16 mm. files; and the second affidavit by Hilton denied that Isacson had access to the 16 mm. files or that the 16 mm. files contained confidential information. As the District Court found, this was not newly discovered evidence (22a). Moreover, the Hilton affidavit could do no more than impeach the earlier testimony of Sargoy, Bracken and Siegel (Rep. 25, 29, 32, 164-165, 139-145) and the documentary evidence introduced on the subject of Isacson's access to the 16 mm. files. See Affidavit of Edward A. Sargoy sworn to May 4, 1954 (317b). Accordingly, the motion for a new trial should have been denied since Federal courts are not empowered to grant a motion for a new trial when the movant offers evidence which merely impeaches earlier testimony. *Marshall's U. S. Auto Supply* v. *Cashman*, 111 F. 2d 140, 142 (10th Cir. 1940); *Slappey* v. *United States*, 110 F. 2d 528 (5th Cir. 1940). However, the alleged newly discovered evidence could not have changed the result because the respondents' case was fully established by documentary evidence and by testimony of Isacson himself on cross-examination.

Petitioners, misconceiving the nature of the motion for a new trial, have attempted to show that they were ill-treated by Judge Abruzzo. As a matter of fact, Judge Abruzzo allowed petitioners the widest latitude on the motion for a new trial. On May 21, 1954, Judge Abruzzo agreed to hear the testimony of Hilton, who had been in charge of Sargoy & Stein's 16 mm. files. Between the time Judge Abruzzo ordered a hearing and the hearing date, petitioners managed to produce Siegel who had testified for respondents during the hearings before the Special Master and who allegedly was prepared to recant a portion of his testimony. Judge Abruzzo, although he should have refused to allow the production of another witness at the hearing, permitted petitioners to examine Siegel.

Petitioners also complain because Judge Abruzzo showed irritation during the hearing on the motion for a new trial. What petitioners really object to is the fact that Judge Abruzzo refused to allow Mr. Kaufman, counsel for Isacson, to testify as to matters on which Siegel would not testify. This captious objection must be considered in the context of petitioners' objection to the fact that Judge Abruzzo warned Siegel, apparently a disgruntled ex-employee of Sargoy & Stein, that he was flirting with perjury.

Judge Abruzzo in imposing reasonable limitations on the quantum of testimony on the motion for a new trial was completely justified since there was no requirement that he grant a hearing at all. Moreover, a decent respect for the principle that there must be an end to litigation demands that a trial court restrict the testimony on a motion for a new trial to new matters which could change the result and that the court refuse to allow a rehashing of matters previously decided.

Petitioners also complain that their first opportunity to argue the question of disqualification before Judge Abruzzo

came at the time of the motion for a new trial. This is the first time that this objection has been made by petitioners and petitioners do not cite to any place in the record where they objected to the submission of this matter to Judge Abruzzo without oral argument. It seems clear that if petitioners had requested oral argument before Judge Abruzzo at the time when he considered the motion to confirm the Master's Report, it would have been granted. The petitioners do not bolster their complaint concerning the District Judge by citing cases where mob violence resulted in the conviction of five Negroes for murder after a 45-minute trial (*Moore* v. *Dempsey*, 261 U. S. 86 (1923)), where a mayor was permitted to act as a judge in criminal trial for prohibition violations and to assess fines out of which the mayor was to be compensated (*Tumey* v. *Ohio*, 273 U. S. 510 (1927)), or where one man acting simultaneously as judge and grand jury summarily punished a witness for contempt on the basis of the testimony of unknown witnesses (*In re Oliver*, 333 U. S. 257 (1948)).

## CONCLUSION

The Petition for a writ of certiorari in this action should be denied.

July 30, 1956.

Respectfully submitted,

BRUCE BROMLEY,
15 Broad Street,
New York 5, N. Y.

LOUIS PHILLIPS,
1501 Broadway,
New York 36, N. Y.
*Attorneys for Respondents.*

JOHN LOGAN O'DONNELL,
LEO P. ARNABOLDI, JR.,
*Of Counsel.*